U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: FEB 19 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will sustain the appeal and approve the petition.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a civil engineer, specializing in transportation safety, currently employed as a postdoctoral associate at the [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

In this decision, the term "prior counsel" shall refer to [redacted] who represented the petitioner at the time the petitioner filed the petition. The term "counsel" shall refer to the present attorney of record.

On appeal, the petitioner submits a brief from counsel and additional evidence.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of Job Offer –
>
> (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on January 30, 2012. In an accompanying statement, prior counsel stated:

> [The petitioner] has made research breakthroughs in occupant safety and vehicle crashworthiness, which . . . have significantly impacted the entire field. . . . She is a highly respected expert in her field of endeavor, with outstanding international reputation.
>
> [The petitioner's] research breakthroughs have received considerable international attention. . . . [The petitioner's] papers have become hot targets of multicitations. . . . Her work has triggered follow-up investigations. . . . She is currently co-directing the
>
> [The petitioner's] research findings have aroused considerable international attention, which have been cited by scientists for many times [*sic*]. The widespread implementation of her work by others in the field reflects her significant impact on the field, as well as international recognition of her work. . . .
>
> Many scientists in the field do not merely reference [the petitioner's] work. They have discussed, **substantively and specifically** on [the petitioner's] work. They are **expanding, extending** [the petitioner's] work.

The record shows that the petitioner has published her work in journals and presented it at conferences, and that she holds a patent for a designed The petitioner submitted copies of her published articles, and copies of several articles containing citations to her work.

A number of witness letters accompanied the initial filing of the petition, including the examples discussed below. the petitioner's academic adviser and research co-adviser during her doctoral studies at , stated:

> [The petitioner] has demonstrated her unsurpassed research capability by her groundbreaking findings about safety and protection of rear seat occupants during her PhD studies. She is among the first scientists to clarify the negative effects of high stiffness frontal structure of cars on the safety of rear seat occupants. Prior to her study, it was considered a fact among the community that advanced high strength steel materials improve safety of vehicle occupants. Her research showed for the first time that in fact this understanding was not true for the population using the rear seats. . . .
>
> At she is working as a Postdoctoral Associate on another line of her passion, crash modeling of Lithium ion batteries. Safety of advanced automotive battery packs is a major obstacle on the way of electrification. [The petitioner] has started modeling of the batteries to determine their safety limits, and make a finite element model of the cell, and battery pack capable of predicting possible short circuit in case

of a crash. With her exceptional talent, she has started producing significant results in the very short time that she has started this research.

director of , stated:

> Over the past seven month[s], [the petitioner] has made several outstanding contributions to my lab. First, she was instrumental in developing an This proposal resulted in launching a new program on crash safety of Lithium-ion batteries. . . . She is currently co-directing the This consortium is bringing over $600,000 support from the car industry. . . .
>
> [The petitioner] is one of the few people pioneering the research in failure prediction of Li-ion batteries. She was the first researcher to systematically study the deformation mechanism in the battery interior under complex loading conditions. . . . What is remarkable is that she developed a prototype computational model for both cylindrical as well as pouch batteries, which has entirely different structural arrangement of the jelly roll. Furthermore, the results of numerical simulation of her computer models agreed very well with independently performed tests.

Regarding the petitioner's work with battery crash safety, executive technical leader for safety at stated: "I significantly rely on the work and the published research that was conducted by [the petitioner] as a pioneer researcher in this newly [*sic*] field of safety."

praised the petitioner's various papers on lithium ion batteries, and stated: "The quality and importance of [the petitioner's work] has recently motivated to award a research contract to her work."

On July 2, 2012, the director issued a request for evidence (RFE). The director acknowledged the petitioner's initial submission, but found the submitted evidence to be insufficient. The director, for instance, stated: "the petitioner did not submit any evidence to show that others [*sic*] individuals or companies have taken an interest in the beneficiary's patent, or to show the impact that the patent has had on the field." The director instructed the petitioner to "submit evidence to establish that *the beneficiary's past record* justifies projections of future benefit to the nation" (emphasis in original).

In response to the RFE, prior counsel maintained that previously submitted evidence demonstrates that the petitioner "is an internationally recognized expert and her breakthroughs including a US patent have impacted the field." The petitioner submitted further witness letters, as well as evidence relating to her compensation, student prizes she received, and further citation of her work.

The director denied the petition on October 1, 2012. The director acknowledged the intrinsic merit of the petitioner's occupation, and found that the benefit from her work is national in scope. The director concluded, however, that the petitioner had not established a past history of influential achievements that would justify projections of future benefit to the United States. Regarding the petitioner's published work, the director stated: "The petitioner was cited only a small number of times by others in the field. The small number of publications and sparse pattern of citation does not show that the petitioner has had a past record of success with some degree of influence on the field."

The director quoted from several witness letters but found them insufficient, stating: "the authors do not provide any examples of whether the petitioner's work is being used by others in the field, or how her research has already influenced the field." The director stated, for instance, that "does not indicate that any companies have expressed an interest in commercializing the petitioner's work" and "does not describe how individuals in the field rely on the petitioner's research, or consider the petitioner's prototype [computational model for battery crash loads] to be influential on the field."

On appeal, the petitioner provides updated citation figures. Counsel asserts, correctly, that "certain scientific fields have widely different rates of publication and citation," and contends: "For [the petitioner's] narrow discipline, this is an extensive amount of citation," because "her field of research . . . is **one of the lowest publishing and lowest citing scientific disciplines due to the newness of research in this area**" (counsel's emphasis). The petitioner submits a copy of an article[1] providing a table of citation ratios by field, demonstrating the petitioner's employment in a relatively low-citation field.

Counsel, on appeal, observes that several citations of the petitioner's work do not merely identify it in passing, but comment specifically on its relevance to the citing article. Prior counsel had made a similar point earlier. Review of the record confirms that a number of citing articles place particular emphasis on the petitioner's work, rather than simply citing it in passing to support a specific claim.

In a new letter, states that his letters "were distorted or taken out of context by the officer reviewing [the petitioner's] case." Review of the record shows that the director, in describing the witness letters, sometimes gave the incorrect impression that the letters were more vague, or less well-supported, than they actually were.

The petitioner's evidence is not without flaws. Several witnesses, for example, praise the petitioner's invention, first described at a 2005 conference and patented in 2008, but none of the witnesses have gone so far as to say that the invention is actually in production or in use. The benefit from a vehicle safety device is entirely hypothetical (and thus nonexistent in the real world) until it is actually used in vehicles (and proven to produce the expected benefits). Nevertheless, the record does establish a pattern of a wide array of researchers relying on the petitioner's work in a

[1] Podlubny, Igor. "Comparison of scientific impact expressed by the number of citations in different fields of science." *Scientometrics*, Vol. 64, No. 1 (2005), 95-99.

variety of important pursuits. Equally important, the petitioner has supported key claims with documentary evidence rather than relying entirely on witness letters to establish claims of fact. *See Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). The record shows significant attention from the automobile industry and the National Highway Traffic Safety Administration, among other authorities in the field. That some of the praise of the petitioner's work is at times exaggerated does not taint or diminish the documented facts underlying the claims.

The evidence in the record establishes that the vehicle safety research community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the AAO will withdraw the director's decision and approve the petition.

ORDER: The appeal is sustained and the petition is approved.